JD(ATL)—21—07 Rochelle, IL

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

ROCHELLE WASTE DISPOSAL, LLC Employer

and

Cases 33-CA-15298 33-RC-5002

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO

Petitioner

Ahavaha Pyrtel, Esq., Counsel for General Counsel.
Lori Hoadley, Esq. and James R. Pirages, Esq., Counsel for Respondent.
Bryan P. Diemer, Esq., Counsel for Charging Party.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, **Administrative Law Judge**: Pursuant to a petition filed on August 18, 2006, by International Union of Operating Engineers, Local 150, AFL-CIO ("the Petitioner" or "Local 150") a Regional Director's Decision and Direction of Election and Supplemental Decision and Direction of Election, an election was conducted on February 1, 2007, among employees of Rochelle Waste Disposal, LLC ("the Employer or Rochelle Waste Disposal") in the following described appropriate collective bargaining unit:

All full-time and regular part-time heavy equipment operators including the scale operator and the landfill supervisor employed by the Employer at the Rochelle Municipal #2 landfill in Rochelle, Illinois, Excluding temporary employees employed through a temporary agency, office clerical and professional employees, guards and supervisors as defined in the Act.

The tally of ballots made available to the parties at the conclusion of the election discloses the following results:

Approximate number of eligible voters	5
Void ballots	0
Votes cast for Petitioner	2

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Votes cast against participating labor organization	2
Valid votes counted	4
Challenged ballots	1
Valid votes counted plus challenged ballots	5

No objections to conduct of the election or to conduct affecting the result of the election were filed by either party within the time provided.

On January 25, 2007, the Petitioner filed an unfair labor practice charge in Case 33-CA-15298, alleging that the Employer violated Section 8(a)(1), (3) and (4) of the Act.

Background

The Employer is a corporation with an office and place of business in Rochelle, Illinois, where it is engaged in the business of providing recycling and waste disposal services including the operation and maintenance of a landfill. At the time of the election there were five employees in the unit under the overall supervision of the owner Clyde Gelderloos. The ballot of Jeff Jarvis was challenged by the Employer on the ground that he was no longer employed as he had allegedly been permanently laid off prior to the date of the election. The employer contends that Jarvis had no reasonable expectancy of reemployment and that accordingly the challenge to his ballot should be sustained.

In the complaint in Case 33-CA-15298 it is alleged that the Employer discharged Jarvis on January 24, 2007, and that by such conduct, the employer has discriminated in regard to hire or tenure or conditions of employment of its employees in violation of Section 8(a)(1), (3) and (4) of the Act.

On April 3, 2007, the Acting Regional Director of Subregion 33 of Region 14 of the National Labor Relations Board ("the Board") ordered that a hearing be held in this matter for the purpose of receiving testimony relative to the challenged ballots and that a Complaint and Notice of Hearing having issued in Case 33-CA-15298 in which the hearing on the allegations of the complaint was scheduled for June 25, 2007, and on consecutive days thereafter until concluded and that it having been ordered by the Acting Regional Director in Case 33-RC-5002, that a hearing be held to resolve the challenged ballot issue, the Acting Regional Director ordered that Cases 33-CA-15298 and 33-RC-5002 be consolidated for the purposes of hearing, ruling and decision by an administrative law judge, and that thereafter Case 33-RC-5002 be transferred to, and continued before, the Board in Washington, DC. Accordingly the Acting Regional Director set a hearing in this consolidated case for June 25, 2007.

As noted above, Local 150 filed the representation petition in Case 33-RC-5002, seeking to represent the aforesaid bargaining unit of heavy equipment operators on August 18, 2006. The Employer contended that Jeff Jarvis was a statutory supervisor and therefore ineligible to vote in the election. On September 1, 2006, Subregion 33 convened a preelection representation case hearing to determine whether Jarvis was eligible to vote in the election. On September 28, 2006, the Acting Regional Director issued his Decision and Direction of Election, concluding that Jarvis was not a statutory supervisor and was therefore eligible to vote. On October 12, 2006, the Employer filed a request to review the Regional

Director's decision. In view of the Board's decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006) which had issued days prior thereto, the Regional Director vacated his earlier decision and reopened the hearing. On November 28, 2006, Subregion 33 conducted a second pre-election representation case hearing. At the hearing the Employer again contended that Jarvis was a statutory supervisor and ineligible to vote and presented additional evidence in support of its position. The Regional Director issued a Supplemental Decision and Direction of Election and again found that Jarvis was not a statutory supervisor and scheduled the election for February 1, 2007. On January 24, 2007, the Employer laid off Jarvis and on January 25, 2007, Local 150 filed an unfair labor practice charge alleging that the Employer violated Sections 8(a)(1), (3) and (4) of the Act by its termination of Jarvis. On February 1, 2007, the election was held. On March 28, 2007, Subregion 33 issued the Complaint in 33-CA-15298, consolidated that case with Case No. 33-RC-5002 and set it for hearing on June 25, 2007.

Jarvis did not appear at the hearing and had advised General Counsel that he would not appear. General Counsel advised the Petitioner of this. At the commencement of the hearing, Local 150 moved to postpone the case. I denied this request. Local 150 also moved to withdraw the charge in Case 33-CA-15298. General Counsel joined this motion and moved to withdraw the complaint in Case 33-CA-15298. I granted these motions and the charge and complaint in Case 33-CA-15298 were withdrawn without prejudice and 33-CA-15298 severed from the pending representation case. On June 26, 2007, the Petitioner moved to rescind the earlier withdrawal of the charge and complaint. The Employer objected and I denied the motion. On June 26, 2007, the second day of hearing, Jarvis appeared pursuant to arrangements made by Local 150 and the representation case was heard to completion. During the course of the hearing the Employer elicited testimony from its witnesses in support of its contention that Jarvis had been laid off because of poor work performance by not requiring that waste products be covered on January 13, 2007. No testimony or payroll records were introduced at the hearing to establish that Jarvis was not on the payroll on February 1st. It was the Employer's burden to prove that Jarvis was not on the payroll and it failed to meet this burden. The Employer also contended that Jarvis had no reasonable expectation of recall. The Employer introduced testimony that it had no past practice regarding layoffs or recalls, that the landfill will reach capacity within one to three years and that it is currently involved in an application process to expand the landfill which could be unsuccessful and that its staffing needs have not increased. However, much of this testimony was speculative. The Employer did not meet its burden of proof to demonstrate that Jarvis had no expectation of recall. Furthermore, the Employer did not meet its burden of proof to demonstrate the landfill was overstaffed. Accordingly, I deny the Employer's challenge and order that the ballot of Jarvis be opened and counted. In Golden Fan Inn, 281 NLRB 226, 230 fn. 24 (1986), the Board held that "the burden of proof rests on the party seeking to exclude a challenged individual from voting."

In its brief, Local 150 renewed its motion that I set aside my earlier ruling denying its motion that I rescind the withdrawal of the complaint. I reaffirm my prior ruling that the charge and complaint are withdrawn without prejudice and are severed from the representation case.

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Accordingly, I order that the challenge to the ballot of Jeff Jarvis should be and it is overruled. It is further ordered that Case 33-RC-5002¹ be remanded to the Regional Director of Subregion 33 to count the ballots cast in the election and certify the results of the election in 14 days or when circumstances permit as determined by the Regional Director.

Dated at Washington, D.C. August 1, 2007

Lawrence W. Cullen Administrative Law Judge

Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by August 15, 2007.